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Scott L. Theurer D.M.C., Employer No. 1-082690-1 v. Board of Review of the Industrial Commission of Utah : Brief of Petitioner

Utah Supreme Court

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20903

IN THE SUPREME COURT OF THE STATE OF UTAH

SCOTT L. THEURER, D.M.C., Employer No. 1-082690-1,	*	
Petitioner,	*	
vs.	*	Supreme Court No. 20903
BOARD OF REVIEW, INDUSTRIAL COMMISSION OF UTAH,	*	
Respondent.	*	

PETITIONER'S BRIEF

AN APPEAL FROM A DECISION OF THE BOARD OF REVIEW
OF THE INDUSTRIAL COMMISSION OF UTAH

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DO THE FACTS AND LAW SUPPORT THE COMMISSION'S CONCLUSION OF LAW THAT PETITIONER HAD ACQUIRED ALL OR SUBSTANTIALLY ALL OF THE ASSETS OF TRANSFERRING EMPLOYER.

II. DID THE COMMISSION ERR IN CONCLUDING THAT A 75% ACQUISITION BY PETITIONER OF THE ASSETS OF TRANSFERRING EMPLOYER REQUIRES CONSIDERATION OF TRANSFERRING EMPLOYER'S EMPLOYMENT HISTORY IN DETERMINING PETITIONER'S CONTRIBUTION RATE.

APPLICABLE LAW

> If an employer has acquired all or substantially all the assets of another employer and the other employer had discontinued operations upon the acquisition, the period of liability with respect to the filing of contribution reports, the payment of contributions, after January 1, 1985, the benefit costs of both employers, and the payrolls of both employers during the qualifying period shall be jointly considered for the purpose of determining and establishing party's qualifications for an experience rating classification. The transferring employer shall be divested of his payroll experience.

Section 35-4-7(c)(1)(C), U.C.A. (1953 as amended)(in part).

STATEMENT OF FACTS

Scott L. Theurer, DMD (Petitioner) fresh out of dental school began his first dentistry practice on or about July 1,

1984 in Logan, Utah. Petitioner had acquired assets for his business from Dr. Steven S. Larson (Larson or Transfering Employer). Larson temporarily discontinued active permanent practice in Logan and moved out of state for the purpose of obtaining specialization training. Petitioner purchased dental equipment from Larson for the amount of $52,750. Larson retained various hand tools, casting machine, etc. valued by Petitioner to be approximately $4,000. Larson also retained his accounts receivable valued by Petitioner at approximately $41,206. Petitioner also contracted with Larson to lease the premises which Larson previously occupied for his practice for two years with no options for Petitioner thereafter. Larson owns the premises. The value of the premises is estimated as $66,000. Petitioner also made a lease agreement with Larson to lease his Lewiston office equipment valued at $10,000. At the time of transition between Larson and Petitioner's practice, Petitioner estimated Larson's business assets at $173,956. Petitioner paid Larson a total of $55,000. The purchase price represented 30% of the value of the assets owned and operated by Larson in his practice.

The total purchase price included dental equipment and a letter of introduction. The letter of introduction informed Larson's patients that he was leaving the area and recommended Petitioner to continue with providing their dental care.

The purchase agreement between the two doctors also contained a restrictive covenant that Larson would not practice

general dentistry within twenty-five miles for a period of five years, which would not restrict Larson from practicing his specialty within the restricted area. When Petitioner acquired Larson's practice there were approximately 1300 active patients of record. Petitioner estimated approximately 100 patients left in preference of a different dentist. Approximately seven to nine hundred have retained Petitioner's services and 200 are of unknown status. Petititioner obtained approximately 300 additional new patients by the hearing date of May 22, 1985.

Based on these facts and pursuant to Section 35-4-7(c)(1)(C), the Commission has concluded that in determining Petitioner's unemployment contribution rate, the employment history of the transferring employer shall be considered. In the Commission's Findings of Fact and Conclusion which is part of the Record of Review at p. 5-6, the Commission concludes in relevant part as follows:

> Dr. Theurer acquired the majority of Dr. Larson's assets for the continuation of the dental practice. Dr. Theurer acquired approximately 75% of Dr. Larson's practice by either purchase or lease agreement; the majority of assets needed for the continuation of a dental practice. Dr. Theurer's succeeding Dr. Larson is further evident by the buying and issuance of a letter of recommendation which allowed Dr. Theurer to retain the majority of Dr. Larson's patients.

Record of Review, p. 5.

Throughout the review process, Petitioner has maintained that he has obtained only 30% of Larson's dental practice assets. Specifically, Petitioner argues that it is error for the Commission to treat a two year lease with no options to purchase

or renew as the equivalent of Petitioner having purchased Larson's office building. In addition, Petitioner asserts that the clear language of the statute requires a showing that the Petitioner acquired "all" or "substantially all" of the assets of Larson, and that a mere majority of the assets does not meet the statutory requirement which would impose the joint consideration provision which the Commission seeks to apply.

In this case, such joint consideration increases Petitioner's contribution rate from the minimum to the maximum rate possible and thereby has a substantially negative financial impact on the Petitioner's business. Petitioner now asks this Court to review and reverse the determination and conclusion of the Commission.

SUMMARY OF ARGUMENTS

I. THE FACTS AND LAW DO NOT SUPPORT THE COMMISSION'S CONCLUSION OF LAW THAT PETITIONER ACQUIRED ALL OR SUBSTANTIALLY ALL OF THE ASSETS OF THE TRANSFERRING EMPLOYER.

The Commission erred in treating a two year non-renewable non-optional lease obtained by Petitioner from transferring employer on transferring employer's office building as if it were a purchase of the building. The Commission also erred in considering a letter of introduction from the transferring employer on behalf of the Petitioner as a transfer of patients. Such errors cause the Commission to erroneously conclude that the Petitioner acquired 75% of transferring employer's assets rather than 30%.

II. THE COMMISSION ERRED IN CONCLUDING THAT A 75% ACQUISITION BY PETITIONER OF THE ASSETS OF TRANSFERRING EMPLOYER REQUIRES CONSIDERATION OF TRANSFERRING EMPLOYER'S EMPLOYMENT HISTORY IN DETERMINING PETITIONER'S CONTRIBUTION RATE.

The language of the applicable statute specifically states that the acquiring employer must acquire "all or substantially all of the assets" of the transferring employer. "Substantially all" is a higher test than a 75% or majority test as applied by the Commission.

ARGUMENTS

I. THE FACTS AND LAW DO NOT SUPPORT THE COMMISSION'S CONCLUSION OF LAW THAT PETITIONER ACQUIRED ALL OR SUBSTANTIALLY ALL OF THE ASSETS OF THE TRANSFERRING EMPLOYER.

This argument has a very narrow focus and calls for the Court's interpretation of the language of the applicable statute, to wit; Paragraph 3 of Section 35-4-7(c)(1)(C), Utah Code Annotated (1953 as amended). The question appears to be one of first impression for the Court as it is specifically applied to the questions raised in this case.

Paragraph 3 of subparagraph (C) specifically states as follows:

> If an employer has acquired all or substantially all the assets of another employer and the other employer has discontinued operations upon the acquisition, the period of liability with respect to the filing of contribution reports, the payment of contributions, ... the payrolls of both employers during the qualifying period shall be jointly considered....

U.C.A. Section 35-4-7(c)(1)(C)(1953 as amended) (Emphasis

added.). The clear language of the statute requires that before there can be a joint consideration for the purpose of determining the acquiring employer's contribution rate, such acquiring employer must have acquired "all or substantially all of the assets" of the transferring employer.

In the Commission's Findings and Conclusions which appear in the Record of Review on p. 5-6, the Commission apparently concludes that by leasing the transferring employer's office building for two years without any options to renew or options to purchase, that such lease is the equivalent of "acquiring" that real asset. In the Commission's Findings of Fact, the Commission finds that the Petitioner's purchase price represents only 30% of the value of the assets owned and operated by the transferring employer in his practice, excluding the lease on the office. In concluding that the Petitioner acquired 75% of the transferring employer's assets, the Commission apparently considered the full $66,000 which was estimated to be the fair market value of the realty as if the Petitioner had acquired it in fee simple. Clearly, a two year lease with no options is substantially less than the full fee simple value of the property.

The lease which was signed between the Petitioner and the transferring employer, Review Record, p. 45-49, provides for a monthly rent of $500.00 for two years. Therefore, the total maximum value of the lease is $12,000. Petitioner submits that the $12,000 would be a more accurate valuation of the value of the lease or its possessory rights in determining the value of

assets transferred between the two employers. If that valuation was used as Petitioner suggests, the total value of assets acquired by Petitioner from the transferring employer would be approximately 39%. The Petitioner suggests that 39% is significantly less than the "all or substantially all" of the assets contemplated by the legislature or the "majority" as concluded by the Commission.

The Commission appears to be especially concerned with the application of the word acquire as applied in the applicable statute. Although the Commission may be correct in its definition of acquire, it is the valuation of the assets that are acquired by means other than purchase which is the concern of the Petitioner. The definition of acquire in Black's Law Dictionary includes the definition applied by the Commission in its Conclusions. Review Record, p. 6. However, a full reading of the definition indicates that the law of contracts contemplates that the person acquiring an asset would "become owner of property; to make property one's own". BLACK'S LAW DICTIONARY, 41 (Rev. 4th Ed. 1968). In the case at bar, Petitioner's acquiring of the building asset is simply the acquiring of a possessory right and he is certainly not a fee simple "owner." A possessory right for two years is and should be considered substantially less than all or substantially all of the realty asset of the transferring employer. Here, the Commission clearly erred.

The Commission also concludes that the Petitioner acquired a

"majority" of the transferring employer's patients. Record of Review, p.6. The Commission apparently arrives at this conclusion based on the fact that Petitioner indicated that he had retained approximately 700 to 900 of the transferring employer's dental patients. The Commission apparently assumes that the Petitioner's retainage of patients was due strictly to a letter of introduction sent to the transferring employer's dental patients introducing the Petitioner. The Commission failed to consider the unique relationship between doctor and patient which would make a letter of introduction rather insignificant with respect to how one chooses a dentist and it appears that the Commission refused to consider that the Petitioner's retainage of a significant number of the transferring employer's patients may well have been due to his personality, place of education, and apparent competence in his practice.

Where this Court is required to give statutory interpretation it is well established that the Court is permitted to investigate the legislative intent behind the law being interpreted. Continental Oil Co. v. Bd. of Review of Indus. Comm., 568 P.2d 727, 730 (Utah, 1977). It seems clear that the intent of the legislature was not to impose what in this case would be the harsh results of the law as the Commission would have it be applied. Here we have a young dentist fresh out of dental school attempting to strike out on his own and establish a dental practice in a local community of the state. He is not acquiring an ongoing wholesale or retail consumer goods

business or manufacturing business wherein the consumption of his product would be virtually unchanged and unaffected by his acquisition. The Petitioner's business involves a very personal professional service. A patient has a wide variety of dentists to choose from in a community and a patient's choice of dentists would be clearly made based on many variables and solely not on the basis of a letter of introduction.

In addition, it should be noted that the transferring employer left the state only on a temporary basis so that he could acquired specialization education in the field of dentistry. The non-competition clause was simply a restriction on the transferring employer from practicing general dentistry in the are and did not restrict his practice in his area of specialty. Therefore, the impact and value of the letter of introduction and non-competition are of insigificant importance in evaluating the amount of assets actually transferred to the Petitioner. What should be given more weight is the fact that the Petitioner had nothing to do with the employment history of the transferring employer, nor was he even a part of the transferring employer's profession at the time that history was established. The Petitioner did not continue employing the same employees that were retained by the transferring employer and in every way really began a whole new business and dental practice. In fact, the facts will show that the transferring employer retained a significant amount of his dental equipment and that he shall continue to practice dentistry in the area. The

transferring employer retained his accounts receivable and retained the dental equipment used in his Lewiston office.

Finally, it is well established and adopted by this Court that taxing statutes, as the applicable statute is, should be strictly construed against the taxing authority and favorably construed to the taxpayer. Continental Telephone Co. of Utah v. State Tax Com'n, 539 P.2d 447, 450 (1975). Such construction is certainly in order here. The clear language of the statute should be strictly construed against the state and based on the finding of the Commission that the Petitioner acquired only 30% of the value of the total assets owned by the transferring employer, the joint consideration for determining the contribution rate of Petitioner should not be allowed.

II. THE COMMISSION ERRED IN CONCLUDING THAT A 75% ACQUISITION BY PETITIONER OF THE ASSETS OF TRANSFERRING EMPLOYER REQUIRES CONSIDERATION OF TRANSFERRING EMPLOYER'S EMPLOYMENT HISTORY IN DETERMINING PETITIONER'S CONTRIBUTION RATE.

Even if this Court allows the Commission's interpretation of the word acquire to include the value of the realty of the transferring employer even though the Petitioner has only a lease on the realty for a period of two years, a strict interpretation of the language of the applicable statute should disallow the joint consideration in determining Petitioner's contribution rate. The Commission concludes, after including the fair market fee simple value of transferring employer's office building, that the Petition acquired "75%" or "the majority" of the transferring employer's assets. Record of Review, p. 6. Even assuming the

Commission is correct in its conclusions, the clear language of the statute requires a showing that the Petitioner acquired "all" or "substantially all" of the assets of the transferring employer. Although 75% is clearly a majority, it is stretching it to conclude that 75% equals the "all or substantially all" as contemplated by the legislature. There is no language in the applicable statute which says anything about a "majority of the assets".

Again, the Petitioner here is entitled to a strict construction by the Court against the taxing authority and in favor of Petitioner. See Id. In this case the Commission is seeking to increase the tax burden of the Petitioner as a result of actions which were totally and completely beyond his control, which took place prior to his even being an employer in the field and classification of employment being considered, and in a business area involving professional services wherein it is impossible to purchase good will and to guarantee by the purchase that any patients will continue with the Petitioner after he acquires assets of the transferring employer. Clearly, in this case the Petitioner is entitled to the strict construction rule regarding taxing statutes.

Based on the Commission's Findings of Fact, Record of Review, p. 5, there are no facts which would justify or substantiate a conclusion by the Commission that the Petitioner acquired "all or substantially all" of the assets of the transferring employer. Indeed, the Findings of the Commission in

fact support the opposite conclusion. The Commission clearly finds that the value of the assets acquired by the Petitioner, excluding the realty, equals only 30% of the value of the transferring employer's assets of his practice. The additional 45% which the Commission finds equals the total amount of assets acquired by the Petitioner (75% total) is derived solely from the $66,000 estimate of the fair market value of the office building, which office building was never transferred in fee simple and is subject only to a two year lease with no options by the Petitioner. The maximum total value of the lease is only $12,000, and that is assuming that the lease is paid in full through its term. A Finding and/or Conclusion by the Commission that the Petitioner has acquired 75% of the assets of the transferring employer is clearly arbitrary and capricious and unsupported by the facts and in fact contradictory to the specific conclusions of the the Commission.

CONCLUSION

A strict construction of Section 35-4-7(c)(1)(C) in favor of the taxpayer would clearly disallow the joint consideration of the Petitioner and transferring employer's employment history in determining Petitioner's contribution rate to the unemployment fund. The clear language of the statute requires a determination by the Commission that "all or substantially all" of the assets of the transferring employer were acquired by the Petitioner. The facts clearly show that the Petitioner acquired only approximately 30% of the assets of the Petitioner. A strict construc-

tion would not allow the commission to include in its valuation of acquired assets the fair market value of realty where the Petitioner has only received a two year non-option lease. In fact, strict construction of the statute would not allow the Commission to consider the lease as an asset at all. The lease is clearly an arms length agreement and at the prevailing lease rate. In addition, the Commission was arbitrary and capricious in determining the amount of assets to be 75% by including the fair market value of the realty when the maximum value of the two year lease would be only $12,000.

Finally, even if the Commission is correct in concluding that the Petitioner acquired 75% of the transferring employer's business assets, such conclusion is not supported by the facts, is contradictory to the conclusions, and does not meet the strict requirements of the statute. On one hand the Commission concludes that the Petitioner acquired 75% of the assets and calls that "the majority" of the transferring employer's assets, and on the other hand it wants the Court to accept 75% as "all or substantially all" of the assets. If the legislature intended the statute to read "all or the majority of all the assets" it would have done so. All or substantially all is significantly more than a mere majority and is clearly more than 75%.

Under the circumstances of this case, the Petitioner is entitled to a reversal of the decision of the Industrial Commission so that his contribution rate to the unemployment fund be consistent with any other new young dentist in the community

just starting to practice. To find otherwise would be contrary to public policy of encouraging young professionals from establishing their practices in this state and in treating all taxpayers fairly without any expos facto effect in application of the law.

RESPECTFULLY SUBMITTED this 16th day of December, 1985.

DAINES & KANE

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing Petitioner's Brief this 16th day of December, 1985 to the following:

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